Royal Selangor Golf Club v Anglo-Oriental (Malaysia) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S7-31-3300-87
LIM BENG CHOON J
16 JANUARY 1990

Contract — Contingent contract — Impossibility of performance — Lease of part of land for 30 years — Lease registered pursuant to Land Code (Cap 138) — Agreement to grant lease for 99 years if Land Code (Cap 138) was amended to allow lease for such term — Land Code (Cap 138) repealed and replaced by National Land Code 1965 — No provision in later statute for lease for 99 years of part of land — Whether contract impossible to perform — Contracts Act 1950, s 33

The plaintiff was the registered proprietor of a piece of land and by a memorandum of lease executed in 1949 agreed to lease to the defendant a part of the land described as lot 1 for a term of 30 years with effect from 1 May 1949. Under s 47 of the Land Code (Cap 138) which was in force at that time, the maximum duration of any lease in respect of land was 30 years. The memorandum of lease was presented for registration on 7 June 1949 and on the same day a second agreement was executed by the parties. Clause 2 of the second agreement provided that if and when the Land Code (Cap 138) was amended to permit the plaintiff to grant to the defendant a lease for 99 years, the plaintiff will, 'subject to the consent thereto being obtained' of any person or persons whose consent thereto was required by virtue of the terms and conditions under which the plaintiff held the land, grant to the defendant a lease for 99 years of the land described in the original lease and upon the same rental terms and conditions as the original lease.

A dispute arose between the parties as regards the construction of cl 2 of the second agreement. The plaintiff commenced an action seeking a declaration that upon the proper construction of the two agreements, the lease of lot 1 should be for a term of 30 years commencing from 1 May 1949 and expiring on 30 April 1979 and also a declaration that the defendant was trespassing on lot 1 and that the plaintiff was entitled to vacant possession of the same. It was contended for the plaintiff that since the Land Code (Cap 138) had been repealed and replaced by the National Land Code 1965 which did not provide for the grant of a 99-year lease in respect of lot 1, the contingent event stipulated in cl 2 of the second agreement had become ineffective and impossible to perform. The case for the defendant was that since sub-s (3)(a) of s 221 of the Code allowed the plaintiff to lease out the whole of the land held under the existing document of title, the plaintiff should apply to the Land Administrator to sub-divide the land in such a way as to enable a separate document of title to be issued in respect of lot 1, thereby enabling the defendant to have a 99-year lease over lot 1. Alternatively, the defendant claimed that the plaintiff should at least grant the defendant a 30-year lease under sub-s (3)(b) of s 221 of the Code with extension up to a period of 99 years as stipulated in cl 2 of the second agreement. It was also a contention of the defendant that the words 'subject to the consent thereto being obtained' in cl 2 of the second agreement indicated that the plaintiff must take steps to get the approval of the Land Administrator to sub-divide the land.

Held, granting the plaintiff's application:

(1) If, and only if, the Land Code was amended to permit the plaintiff to grant to the defendant a lease of 99 years in respect of lot 1 referred to in the original memorandum of lease, then, and only then, would the plaintiff be obliged to grant the defendant a lease of 99 years' duration. No other meaning of the words used in cl 2 of the second agreement was conceivable.

(2) It was clear that the land law had not been amended in such as way as to permit the plaintiff to grant to the defendant a 99-year lease in respect of lot 1. That being the case, the contingent event stipulated under cl 2 of the second agreement had become impossible to perform.

(3) There were no express or implied provisions in cl 2 of the second agreement that the plaintiff should take steps to subdivide its land in order to enable the defendant to take a 99-year lease in respect of lot 1. It was certainly not the duty of the court to recouch the wording of the said clause by importing such provisions.

(4) Bearing in mind that at the time when the parties entered into the second agreement, neither the plaintiff nor the defendant could have known or even anticipated that the National Land Code 1965 would come into existence some 17 years later with the kind of provisions as contained in sub-s (3) of s 221 of the Code, it was a fallacy to suggest that the parties would have in mind that if approval for sub-division was necessary in order to enable the defendant to get a 99-year lease, the plaintiff must take the necessary steps to get such an approval. The most that could be said was that in using those words the parties had in mind that should the land law be changed to allow a 99-year lease to be created over lot 1, with the consent of the Land Administrator or the state authority, then the plaintiff must take steps to get such consent.

[*Editorial Note*: The defendant has appealed to the Supreme Court vide Civil Appeal No 02-43-90.]

Cases referred to

1 *National Coal Board* v *Neill (William) & Son Ltd* [1984] 1 All ER 555 (folld)
2 *Central Bank of India* v *Hartford Fire Insurance Co Ltd* AIR 1965 SC 1288 (folld)
3 *National Land Finance Co-operative Society Ltd* v *Sharidal Sdn Bhd* [1983] 2 MLJ 211 (refd)
4 *Scanlan's New Neon Ltd* v *Tooheys Ltd* (1943) 67 CLR 169 (folld)

Legislation referred to

Contracts Act 1950 s 33
Land Code (Cap 138) s 47
National Land Code 1965 s 221

Wong Soon Foh for the plaintiff.
K Anantham for the defendant.

Cur Adv Vult

Lim Beng Choon J: In this action instituted by the plaintiff, the Royal Selangor Golf Club, against the defendant, the Anglo-Oriental (Malaya) Sdn Bhd, the plaintiff is seeking a declaration that, upon the proper construction of the two agreements creating a lease of a portion of the plaintiff's land for the benefit of the defendant, there should be for a term of 30 years commencing from 1 May 1949 and expiring on 30 April 1979. The plaintiff is also seeking another declaration that the defendant is now trespassing on the said portion of the land and the plaintiff is entitled to vacant possession of the same.

The facts of this case are not seriously disputed. The plaintiff (for convenience I shall refer to them as 'the club' in my narrative of the facts) was at all material times and still is the registered proprietor of the land held under CT No 17211 (former CT No 9729) lot no 7 section 90 located in Kuala Lumpur comprising slightly more than 343 acres. On or about 31 May 1949, the club agreed to lease a portion of the land comprising slightly more than two acres to the defendant (again for convenience I shall refer to them as 'Anglo Oriental' in my narrative of the facts) for a term of 30 years effective from 1 May 1949 at the monthly rental of $55 payable quarterly. It is to be noted that under s 47 of the Land Code (Cap 138), applicable at that time, the maximum duration of any lease in respect of land was for a period of 30 years only. A memorandum of lease was duly drawn up and signed by Anglo Oriental on 31 May 1949 and by the club on 7 June 1949. The portion of the land leased out to Anglo Oriental was delineated in the key plan annexed to and formed part of the memorandum of lease and the said portion was described as lot 1 in the plan. For ease of reference, I shall refer to that portion of land as lot 1 in this judgment.

The lease was said to be subject to the agreements and powers limited under the then Land Code (Cap 138) and the stipulations, modifications, terms and conditions contained in the said memorandum. The more pertinent terms and conditions of the said memorandum are these. Under cl 3 thereof, Anglo Oriental was to erect on lot 1 either two dwelling houses of not less than $25,000 each or one dwelling house worth not less than $40,000. The club was obliged to pay all quit rent in respect of the whole land owned by it inclusive of lot 1. There were the usual terms and conditions of a leasehold agreement inserted in the memorandum of lease such as the need on the part of Anglo Oriental to make prompt payment of the rent reserved and the non-assignment or sub-letting of the lease and upon Anglo Oriental observing and performing the several covenants and stipulations therein, it was entitled to peaceful and quiet enjoyment of lot 1 and the houses built thereon. The usual term concerning the right of the club to terminate the lease on non-payment of the monthly rental for a period of 12 months provided prior notice was given was also inserted in the said memorandum.

The memorandum of lease was presented for registration on 7 June 1949 under the provisions of the Land Code (Cap 138). On the same day, another agreement ('the second agreement') was executed by the parties. The recitals of the second agreement made reference to the lease created under the memorandum of lease. It was stated in the second agreement that in consideration of the sum of $20,000 paid by Anglo Oriental to the club (the receipt of which was duly acknowledged), the club thereupon released and discharged 'the said monthly rentals of dollars fifty five ($55) payable under the said lease or under any other leases granted under the provisions of cl 2 hereunder'. As the dispute of the parties centred on the proper construction of cl 2 of the second agreement, it is appropriate at this juncture to set out in extenso the provisions of this clause which are:

> That if and when the Land Code (Cap 138) is amended to permit the club to grant to the company a lease for 99 (ninety-nine) years the club will, subject to the consent thereto being obtained of any person or persons whose consent thereto is required by virtue of the terms and conditions under which the club holds the land comprised in Selangor certificate of title no 9729, grant to the company a lease for 99 (ninety-nine) years of the land described in the original lease and upon the same rental terms and conditions as the original lease and in this event the original lease shall be surrendered to the club and in this event also no further sum of money shall be payable by the company to the club for commutation of ground rent.

Pursuant to cl 3 of the memorandum of lease, Anglo Oriental erected two brick and plaster houses at its own cost on lot 1 now known as nos 428 and 430 Jalan Tun Razak and they are now still occupied by the employees of Anglo Oriental.

On 30 December 1968, the club wrote to Anglo Oriental indicating that upon the expiry of the lease of lot 1, the club would consider extending the lease for an additional 30 to 60 years if Anglo Oriental was prepared to offer 'a sufficiently attractive premium or rents'. In reply to that letter, Anglo Oriental wrote on 5 February 1969 stating that 'with the coming into force of the National Land Code, circumstances have now arisen whereby the club can grant a lease of the property for the expired portion of the 99-year period commencing 1 May 1949 in accordance with cl 2 of our agreement dated 7 June 1949'. In its response to Anglo Oriental's letter, the club in its letter of 11 February 1969 claimed that the 'National Land Code does not permit the club to grant you a lease for any period more than 30 years'. No further correspondence passed between the parties until 12 September 1977 when Anglo Oriental wrote again to the club insisting that by reason of the passing of the National Land Code which permitted a lease for a period of 99 years where the lease related to the whole of the land held under a particular title, the club could therefore grant Anglo Oriental a 99-year lease if the existing title CT no 17211 under which the whole of the land was held by the club was sub-divided to lead to the issue of separate title to lot 1 currently leased to Anglo Oriental. It was therefore suggested that the club should at least grant a further 30-year lease to Anglo Oriental. No definite response was made by the club until 9 January 1979 when it proposed an extension of five years to the lease and a draft agreement was sent for the approval of Anglo Oriental. Apparently, that proposal was not accepted by Anglo Oriental. There was further non-committal correspondence which passed between the parties. However, on 19 June 1979, Anglo Oriental wrote

to the club rejecting the oral offer made by its secretary to renew the lease for three years with an extension of a further three years upon payment by Anglo Oriental of a monthly rental of $100 for each of the dwelling house and thereafter the rentals would be reviewed at five yearly intervals; Anglo Oriental persisted in seeking for a renewal of the lease for 30 years with effect from 1 May 1979 under the same terms and conditions as stipulated in the original memorandum of lease. As it did not receive any reply from the club, it wrote again on 20 September 1979 and 23 June 1980 reiterating its entitlement to a 30-year lease. On 5 April 1983, the club sought legal advice from its solicitors. On 21 May 1983, the club's solicitors finally wrote to Anglo Oriental demanding that the latter should deliver up vacant possession of lot 1 on or before the end of June 1983 failing which the club would institute legal action for possession of lot 1 and damages. The threat was not carried out until the plaintiff instituted this action on 22 October 1987.

It is clear from the facts adumberated above that the case for the plaintiff is that since the Land Code (Cap 138) had been repealed and replaced by the National Land Code 1965 which does not provide for the grant of a 99-year lease in respect of lot 1, the contingent event stipulated in cl 2 of the second agreement has become ineffective and impossible to perform. On the other hand, the case for the defendant is that since sub-s (3)(a) of s 221 of the National Land Code 1965 allows the plaintiff to lease out the whole of its land held under the existing title CT no 17211, the plaintiff should apply to the Land Administrator to sub-divide the land in such a way as to enable a separate title to be issued in respect of lot 1 thereby enabling the defendant to have a 99-year lease over the said lot 1. Alternatively, the defendant claimed that the plaintiff should at least grant the former a 30-year lease under sub-s (3)(b) of s 221 of the said Code with extension up to a period of 99 years as stipulated in cl 2 of the second agreement.

In considering the dispute of the parties, I must first of all bear in mind the general principles of construction of contract as enunciated in *National Coal Board* v *Neill (William) & Son Ltd*[1] where it is said at p 560:

> The first two issues involve the construction of the contract. I bear in mind the principles of construing a contact. The relevant ones for the purpose of this case are: (1) construction of a contract is a question of law; (2) where the contract is in writing the intention of the parties must be found within the four walls of the contractual documents; it is not legitimate to have regard to extrinsic evidence (there is, of course, no such evidence in this case); (3) a contract must be construed as at the date it was made: it is not legitimate to construe it in the light of what happened years or even days later; (4) the contract must be construed as a whole, and also, so far as practicable, to give effect to every part of it.

In *Central Bank of India* v *Hartford Fire Insurance Co Ltd*,[2] the Supreme Court of India lays stress on the second principle advocated in the *Neill & Son Ltd*[1] case when it says at p 1290:

> Now it is commonplace that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result.

Applying the legal principles discussed above to the present case, it is necessary to examine carefully the wordings of cl 2 of the second agreement. It will facilitate the detection of the meaning of the said cl 2 when that clause is abridged to only the essential wordings and omitting the parenthesized remarks. The abridged form of the clause will then read as follows:

> That if and when the Land Code (Cap 138) is amended to permit the club *to grant to the company a lease for 99 (ninety-nine) years* the club will, ... grant to the company a lease for 99 (ninety-nine) years *of the land described in the original lease* ...

The words which I have emphasized can only mean that if, and only if, the Land Code was amended to permit the plaintiff to grant to the defendant a lease of 99 years *in respect of lot 1* referred to in the original memorandum of lease, then and only then, would the plaintiff be obliged to grant the defendant a lease of 99 years' duration. No other meaning of the words used is conceivable.

Now sub-s (3)(a) of s 221 of the National Land Code 1965 allows a grant of a lease of 99 years only in respect of the whole of any alienated land. Where a lease relates to a part only of the whole land, the maximum duration of the lease allowed is only 30 years (see sub-s 3(b) of the said s 221). To my mind, it is clear that the land law has not been amended in such a way as to permit the plaintiff to grant to the defendant a 99-year lease in respect of lot 1, that is to say the portion of the land described in the original memorandum of lease. That being the case, the contingent event stipulated under cl 2 of the second agreement has become impossible to perform. The law applicable is s 33 of the Contracts Act 1950 which reads:

> (a) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.
> (b) If the event becomes impossible, such contracts become void.

The scope of s 33 has been considered in the judgment of Salleh Abas CJ in *National Land Finance Co-operative Society Ltd* v *Sharidal Sdn Bhd*[3] at p 218 where he said:

> It is therefore obvious that the parties have entered into a contract of sale contingent upon the approval of the transaction by the FIC over which the parties had no control. There was no promise, nor guarantee that such approval would be given. Such a condition, in our judgment, is more than a mere essential stipulation of the contract, a breach of which entitles

an innocent party to regard itself as discharged from further performance and to sue for damage. It is, however, a condition which is known in the law of contract as a contingent condition, the effect of which is that a contract shall not take effect unless and until the condition is fulfilled. (See *Trans Trust SPRL* v *Danubian Trading Co Ltd* [1952] 2 KB 297, 304 per Denning LJ and *Property and Bloodstock Ltd* v *Emerton* [1967] 3 All ER 321 per Sachs LJ.) Until the FIC approval was given, liability for further performance remained unenforceable, ie suspended although neither the respondents nor the appellants could resile from it until it could be definitely ascertained that the condition could not be fulfilled. This is the effect laid down by s 33(a) of the Contracts Act.

The learned Chief Justice went on to say at the same page:

As the approval in this case was refused, it means that contingent event becomes impossible and the agreement therefore becomes void in accordance with s 33(b) of the Contracts Act ...

It is true that in that case the FIC had refused to give its approval thereby rendering the contingent event abortive. In the present case, as I have stated earlier, the land law has not been changed to enable the plaintiff to grant a 99-year lease over lot 1 the portion of the land lease to the defendant. The result is the same. The contingent event agreed to by the parties has become impossible to perform. The second agreement therefore becomes void in accordance with s 33(b) of the Contracts Act 1950.

It is, however, urged that since by virtue of s 221 of the National Land Code 1965 the plaintiff can lease out the whole of its land held under title CT 17211 on a 99-year lease, it should apply to the Land Administrator to have the land sub-divided so that a separate title could be issued to lot 1 thereby enabling the defendant to have a 99-year lease over that part of the land. That is, according to counsel, the proper assumption that one can draw from the wordings of cl 2 of the second agreement. The answer to such a contention can be found in the following passage of Latham CJ in *Scanlan's New Neon Ltd* v *Tooheys Ltd*[4] at p 194:

But an assumption which is not incorporated in a contract and which relates only to what I may call 'uncovenanted benefits' has no significance in relation to the extent of the obligations of the parties under the contract.

The learned Chief Justice then went on to say at p 200:

I suggest, with respect, that it is much safer, when parties have chosen to contract in absolute terms, to hold them to the terms of their contract. If they desire the contract to be conditional, they can readily so provide in express terms.

Again, lower down in the same page, he said:

Prima facie a promisor takes the risk of an event happening which prevents him from performing his promise. If he fails to perform it, he must pay damages and the other party may, if the promise goes to the root of the contract, elect to determine the contract. If, however, on the true construction of the contract (including both express and implied terms) the obligation to perform the promise did not arise unless some subsequent event occurred, there is no breach of contract unless that event has occurred.

There is no expressed or implied provisions in cl 2 of the second agreement that the plaintiff should take steps to sub-divide its land in order to enable the defendant to take a 99-year lease in respect of lot 1. It is certainly not the duty of this court to recouch the wordings of the said clause by importing such provisions. It is, however, urged by counsel for the defendant that the words 'subject to the consent thereto being obtained' indicated that the plaintiff must take steps to get the approval of the Land Administrator to sub-divide the land. With due respect, I cannot agree to such a suggestion. Bearing in mind that at the time when the parties entered into the second agreement, neither the plaintiff nor the defendant could have known or even anticipated that the National Land Code 1965 would come into existence some 17 years later with the kind of provisions as contained in sub-s (3) of s 221, it is a fallacy to suggest that the parties would have in mind that if approval for sub-division was necessary in order to enable the defendant to get a 99-year lease, the plaintiff must take the necessary step to get such an approval. The most that can be said is that in using those words, the parties had in mind that should the land law be changed to allow a 99-year lease to be created over lot 1 with the consent of the Land Administrator or the State Authority, then the plaintiff must take steps to get such consent. To illustrate the fallacy of the defendant's contention, let us suppose that the National Land Code 1965 was enacted with provisions that a lease of 99 years could be granted in respect of a part of the alienated land where that part comprised of not less than three acres. Would this mean that the defendant could pursuant to cl 2 of the second agreement demand that the plaintiff should take steps to cut up a bit of its land and give the extra bit of land to the defendant to enable the latter to enjoy a 99-year lease? It is inconceivable that the answer to this question could be in the affirmative. The defendant had taken the risk of the impossibility of the performance of the contingent event. There is therefore absolutely no ground for the defendant to complain.

For the above reason, I must give judgment in favour of the plaintiff. The declaratory orders sought by the plaintiff are allowed with costs to be paid by the defendant.

Application allowed.

Solicitors: *Chooi & Co*; *Skrine & Co.*

Reported by *PS Ranjan*